Court and Statutory Guardianship:

The Patients Property Act
and
The Adult Guardianship Act (Part 2)

A DISCUSSION PAPER

ON

MODERNIZING THE LEGAL FRAMEWORK

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PART 1: INTRODUCTION

British Columbians have constitutional, common law and statutory rights to make their own decisions. These rights are fundamental to the self-determination and autonomy of each of us as individual members of society. We are generally free to live as we choose provided that we do not interfere with the safety or security of others even if our choice of lifestyle is not one that might be shared by most. Some of us, however, need help making decisions, or need someone else to make decisions for us. This paper examines some of the issues involved in the way decision-makers are appointed for us when we are not able to make our own decisions and in how those decision-makers carry out their responsibilities.

For many hundreds of years, the courts have at common law, been responsible for deciding when people need help with decision-making. More recently, statutory schemes, such as British Columbia's *Patients Property Act*, have provided for the appointment of decision-makers. Related to this has been the developing doctrine of capacity - the legal test for determining whether or not an individual has the ability to make and exercise choices on his or her own behalf. While the practices of the past were fairly severe in stripping away an individual's right to self-determination once found to be incapable, more recent efforts at law reform have sought a middle ground between protecting people (from themselves and others) and preserving their autonomy.

In addition, the law has developed in recent decades to permit planning for possible future incapacity – first for decisions about financial and legal affairs (through Enduring Powers of Attorney) and more recently for decisions about personal care decisions (through Representation Agreements). However, the fact remains that while some British Columbians will avail themselves of these planning opportunities, many will not.

British Columbia has experienced its share of law reform efforts in this area, the last major one being in 1993 when a series of four statutes, collectively known as the Adult Guardianship Statutes, were developed. Practical and fiscal difficulties associated with the implementation of these statutes, however, meant that it was not until 2000 that they were proclaimed, and even then it was only a partial proclamation. The 2000 proclamation brought into force most of the *Representation Agreement Act*, Part 3 of the *Adult Guardianship Act*, *Part 2* of the *Health Care (Consent) and Care Facility (Admission) Act*, and most of the *Public Guardian and Trustee Act*. A major area left out of the proclamation, and the one which is the subject of this paper, was a new scheme for guardians set out in the *Adult Guardianship Act (Part 2)*. The decision not to proclaim this part has meant that the law remains largely as it was when the 1962 *Patients Estates Act* (renamed the *Patients Property Act*) came into effect.

Reform of this area is no longer simply a matter of bringing the work done in 1993 into effect. The intervening ten years have not resolved the concerns which held back the proclamation of the *Adult Guardianship Act (Part 2)*. A fresh approach is needed if British Columbia's statutory and court appointed guardianship laws are to be modernized in the foreseeable future.

This paper examines the issues that must be addressed in reforming British Columbia's laws dealing with the long term guardianship of adults. The expression "long term" is used to distinguish this area of law from the more transactional or "short term" aspects of substitute decision-making found in statutes such as the *Health Care (Consent) and Care Facility (Admission) Act*. Long term guardianship encompasses both court ordered guardianship as well as statutory guardianship. Where specific reference is made to existing provisions in the *Patients Property Act*, the term "committee" is used.

The principles underlying the reform of long term guardianship should include:

- adequate procedural fairness to protect the civil rights of British Columbians in accordance with the *Charter of Rights and Freedoms*
- minimal interference with the autonomy of individuals through the provision of adequate but not excessive intervention
- the use of private rather than public responses where appropriate
- affordability for private individuals and the public
- recognizing the mobility of British Columbians
- reasonable consistency, in both general approach and in detail, to other British Columbia substitute decision-making laws so that the various laws work together harmoniously
- better consistency with long term guardianship laws elsewhere in Canada
- resolving the most pressing problems and issues that have arisen under the existing law.

In applying these principles, more than one answer will invariably surface in response to the variety of human circumstance that guardianship law covers. While it is important to think creatively and innovatively about law reform, the recommendations set out in this paper propose a fairly modest modernization. British Columbia's long term guardianship laws are falling behind those elsewhere in Canada. Responsible steps in modernization are needed to respond to the current environment. Pilot projects to explore advanced ideas can help point the way towards the future.

The next part of this paper provides a brief overview of the statutes dealing with long term guardianship in British Columbia. This includes examining the *Patients Property Act*, the 1993 reform effort set out in the *Adult Guardianship Act (Part 2)* and a description of the context for reform provided by British Columbia's other substitute decision-making laws. Part 3 of this paper identifies the individual issues that must be addressed in reforming long term guardianship laws and makes recommendations aimed at achieving the much needed modernization of these laws.

PART 2: EXISTING LAW AND THE CONTEXT FOR REFORM

The current scheme for the appointment of long term guardians is set out in the *Patients Property Act*. The *Act* provides for the appointment of both a Committee of Estate and a Committee of Person. A Committee of Estate is responsible for making substitute decisions in the area of an individual's financial and legal affairs, a Committee of Person in the area of an individual's health and personal care. To be appointed as someone's Committee of Estate or Committee of Person or both, a family member or other individual must make an application to court. This can be supported by a Nomination of Committee made by the adult before the person became incapable, but it is in the court's discretion who it appoints. In appropriate cases, the Public Guardian and Trustee can be appointed by the court as either, or both, Committee of Estate and Committee of Person.

The Public Guardian and Trustee can also be appointed Committee of Estate (but not Committee of Person) through a different process. The *Act* provides for the statutory appointment of the Public Guardian and Trustee (i.e.without going to court) where a Certificate of Incapability has been issued by certain officials designated under the *Mental Health Act*. The Public Guardian and Trustee receives the majority of its Committee of Estate appointments through this process.

The scheme of committee appointments under the *Patients Property Act* should be distinguished from the self-directed personal planning a capable individual can do in making an Enduring Power of Attorney or Representation Agreement. Both an Enduring Power of Attorney and Representation Agreement allow an individual to name their substitute decision-maker in advance. If no plan has been made, however, the *Patients Property Act* ensures that someone can be appointed to provide assistance if that becomes necessary.

A. The *Patients Property Act*

Over the years, many concerns have been expressed regarding the *Patients Property Act* and its predecessors including:

- lack of statutory process regarding the issuance of certificates of incapability and the triggering of statutory committeeship without court order
- lack of standards for conducting assessments of incapability
- general absence of statutory duties for committees
- inadequate termination provisions that have the effect of unnecessarily prolonging the duration of committeeship
- inaccurate and stereotypical terminology such as referring to adults as "patients"
- the imposition of court costs that pose a barrier to families acting as committee (particularly for people of modest means)
- the unclear application of the *Act* to children (until a recent decision of the British Columbia Court of Appeal)

- the inadequate manner in which the *Act* applies to personal care decision-making
- lack of sufficient statutory direction regarding the fees that may be charged by committees, including corporate trustees.

On the other hand, there are those who find some value in the *Patients Property Act* citing:

- the long tradition of the *Act* and its familiarity in the legal and judicial communities
- benefits to particular adults from the strongly protectionist character of the *Act*
- recognition that while some court, legal and other costs are imposed, these are less than might occur in other more judicially intensive guardianship laws.

B. The 1993 Reform – The *Adult Guardianship Act (Part 2)*

The *Adult Guardianship Act (Part 2)* was intended to repeal and replace the *Patients Property Act*. The reforms it featured included:

- the elimination of statutory property committeeship so that guardianships could only be created through court appointment
- three levels of decision-makers depending on the nature and degree of the adult's need for a substitute
- court appointment only where informal solutions do not address the needs of the adult
- monitors to oversee the conduct of individual guardians
- court reviews of guardianships including committees appointed prior to the *Adult Guardianship Act* coming into force.

As previously noted, unresolved concerns with the *Adult Guardianship Act (Part 2)* meant that while passed, it has never been proclaimed. Specific concerns with the 1993 law included:

- the cost of eliminating statutory committeeships particularly in relation to individuals of modest financial means
- the cost of having three levels of court appointed substitute decision-maker, particularly in relation to adults with degenerative conditions who might require multiple court appearances
- the cost and complexities of the evidence needed to determine the level of authority needed
- the workability of the monitor provisions
- the cost and intrusiveness of the ongoing court reviews including mandatory capability reassessments and detailed document service requirements
- the cost of reviewing existing *Patients Property Act* committeeships in order to bring them under the new law.

C. Other Substitute Decision-Making Laws in British Columbia

Court and statutory guardianship laws do not exist in a vacuum. They are part of a network of laws that address a variety of circumstances faced by adults needing assistance in decision-making. These include laws relating to:

- incapability planning (*Power of Attorney Act*, the *Representation Agreement Act* and the anticipated future reform of these laws arising from the 2002 McClean Report)
- health care consent (Part 2 of the *Health Care (Consent) and Care Facility (Admission) Act*)
- care facility admission (the unproclaimed Part 3 of the *Health Care (Consent) and Care Facility (Admission) Act*
- the protection of adults in vulnerable circumstances who are being abused, neglected or suffer from self-neglect (Part 3 of the *Adult Guardianship Act* and the investigative provisions of the *Public Guardian and Trustee Act*).

It is important and desirable that these acts work harmoniously with one another and be reasonably consistent. It is only in this way that conflicts between laws will be avoided and individuals will not suffer the experience of falling through legislative cracks. Therefore it is important that law reform proceed in an integrated manner where possible and where not, that at least there be a high level of policy consistency between the various laws.

D. Guardianship Law Reform in Other Canadian Jurisdictions

Guardianship law reform is not unique to British Columbia. It has occurred in a number of jurisdictions throughout Canada, and indeed internationally. While significant distinctions certainly exist between the laws passed across Canada there are some common themes:

- new emphasis on procedural fairness, autonomy and self determination
- modernization of incapability planning documents
- new and refined assessment procedures
- statutory articulation of duties for guardians.

The first modern adult guardianship statute was passed in Alberta in the mid 1970s. This statute, the *Dependent Adults Act*, contained many innovative and progressive features that later found their way into the early 1990 amendments to Quebec's *Civil Code* and the *Code of Civil Procedure*, Ontario's *Substitute Decisions Act* and Manitoba's *Vulnerable Persons Living with a Disability Act*. The *Dependent Adults Act* also influenced British Columbia's 1993 statute, though the *Adult Guardianship Act* moved British Columbia to the leading edge of reform efforts. These statutes in turn influenced law reform in Saskatchewan, the Northwest Territories (and now Nunavut), Prince Edward Island, and most recently, the Yukon.

Adult guardianship law reform has yet to occur in Nova Scotia, New Brunswick and Newfoundland where existing legislation continues to reflect aspects of the English *Lunacy Act* of 1890 and even earlier English statutes. This has been a matter of concern for the Nova Scotia Law Reform Commission, and reforms have been recommended for that province.

A modest set of reforms of the kind suggested in this document would place British Columbia in a more consistent position with the majority of Canadian jurisdictions that have modernized their adult guardianship legislation.

PART 3: PROPOSED AREAS FOR REFORM

This paper outlines nine major areas for reform:

- improving procedural fairness in court and statutory guardianship appointments
- clarifying that the act relates to *adult* guardianship and therefore does not apply to children
- modernizing the powers and duties of property guardians
- modernizing the role, powers and duties of personal guardians
- clarifying information and privacy issues relating to guardians, third party holders of information and adults under guardianship
- recognizing the mobility of adults under guardianship
- modernizing the structure for fees charged by guardians
- clarifying the supervision of private guardians by the Public Guardian and Trustee and by the Supreme Court of British Columbia
- modernizing the law relating to legal proceedings of persons under guardianship.

Within each of these 9 topics there are up to 6 sub-areas, and in some cases these sub-areas are further divided into specific issues. At the conclusion of each issue there is a specific recommendation for reform.

A. Enhancing Procedural Fairness and Related Improvements in Guardianship Appointments

The *Charter of Rights and Freedoms* has changed our modern understanding of procedural fairness and strengthened the doctrine of minimal state interference in the rights of citizens. In many areas, procedural rules are in place to reinforce the principle that personal liberty must not be overridden except in accordance with fundamental justice. Where there is a need for legislative intrusion with an individual's liberty it should be the least intrusive model possible.

In the context of adult guardianship law, there is general support for these concepts at a theoretical level. The difficulty lies in how specific the procedural rules need to be in order to ensure due process and minimize interference in the rights of adult British Columbians.

The following discussion focuses on various aspects of the court and statutory guardianship appointment processes. The objective of each recommendation is to balance respect for the fundamental aspects of procedural fairness and minimal intervention without overly complicating the process or requiring unduly expensive steps to be taken.

1. Improving Court Guardianship Applications

(a) Requiring Service of the Court Application

i) On the Adult

Currently, the *Patients Property Act* permits a committeeship order to be made without service on the adult with leave of the court (Section 2(3) and (4)). Avoiding service on the adult reflects an era of paternalism that is outdated. Furthermore, such avoidance is ineffectual. If the committeeship order is granted, the adult will be aware that their decisional rights have been removed by court order. If they are interested in inquiring about the basis on which this has occurred, they can review the public court file which will contain the very evidence not served upon them.

In at least one other province, not only is service of the application required, but the applicant must, in addition, advise the adult in plain language about the application and about the adult's right to oppose it (unless such notice is not possible to give). While such a plain language explanation may, in the long run, be desirable, at this time ensuring that all persons subject to a guardianship application are at least served with the legal documents is an important first step.

> *Recommendation: Notice of court guardianship applications must be served on the adult.*

ii) On a Family Member

The *Patients Property Act* currently does not require that any family members be served with the court application by the prospective committee. It is common practice to indicate whether family members are aware of the prospective application in the Affidavit of Kindred and Fortune but such reference is not required under the form prescribed under the *Patient Property Act Rules* (Form 3).

The *Adult Guardianship Act (Part 2)* requires service on a near relative along with service on a number of other individuals and organizations.

Service on the nearest known capable relative to the adult (other than the applicant) would appear to be a useful improvement. As an alternative, the court could require service on someone else if the family situation made this seem advisable.

> *Recommendation: Notice of court guardianship applications must be served on a near adult relative of the adult unless the court orders that*

such relative not be served and/or that other relatives or other persons be served.

(b) Establishing the Need for Substitute Decisions

Currently under the *Patients Property Act*, where the court is satisfied with the evidence of incapability, it does not necessarily have to consider the question of whether the adult actually needs the support, protection and assistance of a committee. Modern guardianship laws typically require the court to consider this question explicitly. In some cases the court will find that there are no reasonably foreseeable decisions that need to be made that require the involvement of a guardian.

Recommendation: A guardian not be appointed unless the court is satisfied that in addition to the adult not being capable of making decisions there are, in fact, reasonably foreseeable decisions that need to be made by a guardian.

(c) Considering Alternatives to Guardianship

An adult may be incapable and decisions regarding property or personal matters may be required but the formal intervention of a guardian may not be necessary. Many applicants for guardianship have considered less restrictive alternatives before applying for guardianship. For example, it is a policy of the Public Guardian and Trustee to do so before applying for committeeship. These alternatives can include the informal support of family and friends as well as other legal alternatives such as statutory trusteeship of federal pension income. The court should also be able to consider alternatives. The legislation should permit the court to arrive at a determination of this issue efficiently and in a manner not requiring speculation.

Such a provision is in existence in at least one other jurisdiction and has not been controversial or particularly difficult to implement.

Recommendation: Expressly permit the court to not appoint a guardian if it is satisfied that a less restrictive alternative would meet the adult's needs. Permit termination of an existing guardianship on the same grounds.

(d) Considering Plenary and Enumerated Authority Models

It is open to the court under the *Patients Property Act* to restrict the scope of authority of a committee (Section 16). Usually, however, the court gives plenary authority so that the committee is able to make all necessary decisions related to the management of the adult's affairs (Section 15). The consequence to the adult is that the adult is no longer empowered to make any decisions, even those they may be capable of making on their own.

The following discussion addresses this issue in the context of both property decisions and personal care decisions and proposes that different considerations should apply depending on which type of decision needs to be made.

(i) Property Decisions

Enumerating the various types of property authority in statute is complex. Indeed even a non-exhaustive definition of "routine management of the adult's financial affairs", found in the *Representation Agreement Regulation*, s. 2, runs to two full pages.

Property authority is best left general, subject to the court being able to restrict the authority of the guardian if satisfied that the adult is capable of making some but not all types of decisions or to provide for additional protections for particular assets.

> *Recommendation: Plenary authority be retained for property decisions. The court be permitted to restrict the authority.*

(ii) Personal Care Decisions

The situation differs somewhat for personal care decisions. Such decisions are somewhat more amenable to better and more precise delineation. Therefore, a system that attempts to more finely determine those areas in which a personal guardian is required better embodies the notion of minimal interference. However, this must be balanced with two factors that particularly arise in guardianship:

- that substitute decisions will be required in areas that are unforeseen at the time of the appointment and;
- the individual may be incapable of more decisions at a reasonably forseeable future point in time due to a degenerative condition.

Personal care decisions can be grouped into 4 categories:

- Health care, including nutrition and hygiene
- Shelter, including accommodation and care facility admission
- Participation, including involvement in activities and association with other people
- Personal safety.

The creation of 4 areas of personal care guardianship represents a compromise - greater definition and articulation than found in the *Patients Property Act* but without requiring a large number of separate decisions regarding incapability.

Recommendation: The scope of personal guardianship be clarified as applying to decisions related to general areas such as health care, shelter, participation in activities and safety. A personal guardian with full authority should not be appointed for all areas of decision-making unless the court is satisfied that the adult is incapable in all such areas.

(e) Prohibiting Persons from Acting as Guardian if they are Service Providers for Compensation

There are no statutory limitations on who the court can appoint as a committee under the *Patients Property Act*. Rather the *Act* permits "any person" to be appointed (s.6(1)).

The *Adult Guardianship Act (Part 2)* would prohibit persons from being appointed as guardian if they are providing health care or personal care services for remuneration.

The general intent of the prohibition in the 1993 *Act* appears desirable but the prohibition may go too far in that it includes family members who may provide certain services to an adult. Thus any such prohibition should be tailored not to exclude family members. There may be a further need to permit the court, in exceptional cases, to appoint a guardian who otherwise would be prohibited by this provision such as a former foster parent of a former child, now an adult.

Recommendation: Persons who provide remunerated personal and health care services to an adult be ineligible to be appointed (or to continue to act) as guardian (except in the case of family members or others expressly authorized by the court in extraordinary circumstances).

(f) Respecting the Adult's Choice of Committee

The *Patients Property Act* provides that an adult may, when capable, nominate an individual to act as their committee should the need arise. The provision is quite restrictive in that it requires that such nomination be in accordance with the formalities required for the execution of a will. In the event that such a nomination is created and brought to the attention of the court, it will be considered by the court as persuasive but not determinative. Nominations do arise but they are relatively rare. Practice in the legal community varies widely. Some lawyers proactively present the option of nominating a committee when carrying out incapacity planning with their clients, others do not.

More common is the situation where no nomination has been made but the adult has expressed some measure of trust in a particular person through appointing them in some

other fiduciary capacity (as an attorney under a power of attorney, representative under a representation agreement, trustee under a trust or executor of a will). Alternatively, the adult may have made no such formal documents but had expressed in written or verbal statements their desire that a particular person either be, or not be, appointed to a position of trust or authority. Sometimes multiple statements have been made by the adult and these statements are not always consistent.

The *Adult Guardianship Act (Part 2)* retains the nomination provisions but eliminates the requirement that the nomination be in accordance with the formalities associated with making a will. It simply provides that it must be in writing.

The courts have considered the adult's views about the choice of committee in a number of cases (e.g. *Finlay v. Finlay* (1997) 16 ETR (2d) 216 (BCSC)). Courts have generally decided that they are not bound by any one particular form of nomination but must consider a variety of expressions of the adult's preference. In light of this, there does not seem to be a reason for any particular set of formalities to accompany a nomination. There is value, however, in having a written nomination available as one method of expression of the adult's choice about who should be guardian. Such nominations could be filed with the Public Guardian and Trustee (or perhaps with the Nidus Registry in the event that this Registry expands to include such documents), so that the existence of a nomination comes to light in the event of a guardianship application. However, given the non-binding nature of any nomination no matter how created, the necessarily intimate knowledge and involvement with an adult that a guardian obtains through their role and the desire to ensure the broadest possible consideration of all factors, the court should consider the views of the adult, however expressed, as to the identity of their guardian. Such views should not bind the court but where the adult objects to the appointment of a particular person the court should not appoint that person if they are satisfied that there is an alternative suitable guardian that is prepared to act.

> *Recommendation: That the court be required to consider any views expressed by the adult regarding the identity of their guardian. Nomination of guardians be retained but the formality requirements be eliminated.*

(g) Requiring Guardianship Plans

It is important that, in considering an application for guardianship, the court understand and appreciate the nature of the property or personal care decisions that are required on behalf of the adult. Rule 2 (3) of the *Patients Property Act Rules* requires that an Affidavit of Kindred and Fortune be filed by an applicant for Committeeship of Estate or Person. The form of Affidavit is set out in the rules in Form 3. The Affidavit of Kindred and Fortune requires that the property of the adult be listed including any real estate, beneficial interest in life tenancy, net income, capital, debts and cost of maintenance. The Affidavit does not require that the applicant indicate how they plan to manage this property nor does it deal with personal care issues requiring substitute decisions. However, increasingly, committeeship applicants are incorporating prospective plans of

management within the Affidavit of Kindred and Fortune, sometimes at the instance of the court. However, practice remains inconsistent in this area and there is neither statutory foundation nor standardization of such plans.

The scheme under *Adult Guardianship Act (Part 2)* required the filing of four reports: a needs report prepared by a designated agency; an assessment report also by a designated agency; a report from the Public Guardian and Trustee; and a support and assistance plan prepared by the applicant. The needs report and the support and assistance plan taken together presumably identified the decisions that needed to be made. The court order itself was intended to be sufficiently specific as to identify, with a fair degree of particularity, the management of the adult's financial and personal care affairs.

The trend towards requiring guardian applicants to indicate how they intend to act would appear desirable. It ensures that applicants have an appreciation for the nature and complexity of the task they propose to undertake. Furthermore, it provides information to the court regarding the thoroughness of the applicant's plan and their suitability.

The *Adult Guardianship Act* structure, however, appears to be overly complex as well as unclear about where accountability properly lies. It is important to ensure that the applicant has developed a reasonable and comprehensive plan rather than requiring reports to be prepared by third parties. Furthermore, such third party reports add considerably to the public and private expense of a guardianship application.

The purpose of a guardianship plan is to better inform the court (in the case of court guardianship) or the Public Guardian and Trustee (in the case of transfers of statutory guardianship – see below) in making a decision about whether to appoint an applicant as guardian. It is important that plans be accurate, up to date and complete. The plans, however, should not unduly constrain the authority of the guardian. In circumstances where a decision needs to be made that varies from the plan but is consistent with the court order and duties of the guardian, then such duties should prevail over any particular course of action set out in the guardianship plan. Where such decisions have occurred, the guardian should update the guardianship plan within a reasonable time thereafter.

> *Recommendation: Applicants for court or statutory guardianship be required to prepare a property or a personal guardianship plan with such plan to form part of the application. The sufficiency and appropriateness of the plan is to be considered in determining whether or not to appoint the applicant as guardian. Guardians be required to keep plans up to date.*

2. Improving Statutory Guardianship Process

As previously noted, one way that the *Patients Property Act* provides for the appointment of a Committee of Estate is through the issuance of a Certificate of Incapacity. This certificate, signed by a director of a Provincial mental health facility as defined in the *Mental Health Act* or by an officer in charge of a psychiatric unit, states that the named person is incapable of

managing his or her affairs due to mental infirmity arising from disease, age or otherwise (Section 1(a)). No other formalities accompany the creation of a committeeship in this way.

Dissatisfaction with this lack of process has led to considerable concern being expressed about the statutory guardianship provisions. The *Adult Guardianship Act (Part 2)* would have abolished all non-court guardianships. Existing statutory guardianship were to be "grandparented" for a period of 5 years during which time it was expected they would be replaced by court appointments where appropriate.

In 1992 the Public Trustee issued guidelines to directors of provincial mental health facilities and psychiatric units regarding the issuance of certificates under the *Patients Property Act*. These guidelines were updated in 1996 by the Public Trustee and in 2002 by the Public Guardian and Trustee following consultation with stakeholders. These guidelines have provided considerable support, promoted consistency and most importantly have fostered a best practice approach to implementing the current law. However, these guidelines are not law and compliance with the guidelines remains optional.

Retention, rather than abolition, of statutory guardianship is a necessary compromise at this time particularly given the "user pay" legal tradition in British Columbia for court committeeship applications. Even uncontested committeeship applications typically cost a few thousand dollars. For individuals of modest means, spending all or most of their money on a court application to determine who should manage that money is pointless. Furthermore, in an era of heightened awareness of personal privacy, statutory guardianship can more readily protect intimate personal details of an adult's situation than the public court process.

This is not to say, however, that the statutory guardianship system cannot be improved. The following recommendations propose changes aimed at increasing fundamental protections within the statutory guardianship process.

(a) Requiring Assessment Before Certificate of Incapability is Issued

Currently there is nothing in the *Patients Property Act* that requires an individual to be assessed before a Certificate of Incapability is issued. While undoubtedly this is the practice in the vast majority of cases, it is somewhat unusual that evidence of incapacity is required for the purpose of a court guardianship application but not for the purpose of statutory guardianship.

Recommendation: That no Certificate of Incapability be issued unless an assessment has been performed that indicates that the adult is not capable of managing his or her property.

(b) Requiring the Adult be Notified of the Assessment

The failure of the *Patients Property Act* to require an assessment also means that adults are not required to be told that they are being assessed and for what purpose. It is fundamental that an adult be told that they are the subject to an assessment as well as the purpose and potential consequences of the assessment.

> *Recommendation: The assessor provide notice to the adult that they are the subject of an assessment.*

(c) Prescribing Minimum Standards of Assessment

Considerable work has been done both with respect to the *Patients Property Act* assessment guidelines and the similar guidelines for incapability assessment under Part 3 of the *Adult Guardianship Act* (related to abuse, neglect and self-neglect). These standards cover a variety of issues that are designed to ensure that assessments are carried out in a manner that is respectful, timely, efficient and accurate. Such standards could, with some modification, be made mandatory (as they already are under Part 3 of the *Adult Guardianship Act)* for statutory guardianship. Given that a finding of incapability is triggered through operation of law rather than through any subsequent decision-maker the imposition of minimum legal standards of assessment should not be controversial.

The question arises as to who should be responsible for establishing these standards. As noted above, on three occasions in the past eleven years, standards under the *Patients Property Act* have been issued by the Public Guardian and Trustee following broad consultation. However, as indicated above, these standards do not have force of law, but are simply best practice. The fact that the guidelines were issued by the Public Guardian and Trustee, the very authority that becomes statutory committee on the issuance of a certificate, has perhaps not been controversial because the guidelines are optional.

Incapability assessments for the purpose of Part 3 of the *Adult Guardianship Act* under the *Adult Guardianship (Abuse and Neglect) Regulation* (BC Regulation 13/2000) are performed pursuant to mandatory rules (see Regulation section 3(2)). These rules are issued by the Public Guardian and Trustee. However, under Part 3, the incapability assessment is merely a condition precedent to a Provincial Court application for a Support and Assistance Order; the assessment does not result in automatic Public Guardian and Trustee involvement.

Where an incapability assessment would result in the Public Guardian and Trustee being appointed statutory guardian, the Public Guardian and Trustee should not be made responsible for establishing the mandatory standards under which the assessment is to be conducted. To do otherwise, could raise the concern that the standards were set with a view to increasing or decreasing the number of statutory guardianships. In at least one other jurisdiction, these standards are established by the Attorney General. Alternatively,

these standards could be established by regulation. In any event, they should be publicly available.

> *Recommendation: Assessments of incapability to manage property shall be subject to publicly available standards of assessment that are mandatory. These standards should be established by the Attorney General or Lieutenant Governor in Council.*

(d) Permitting Assessments on Collateral Information in Limited Circumstances

Currently, as there is no legal requirement that an assessment take place, there is nothing requiring that the adult be directly involved in the process. Generally, assessments are completed through face-to-face interaction between an assessor and the adult. In certain circumstances, however, such as where an adult refuses to meet with an assessor, such personal interaction is not possible. However, there are no rules to guide assessors if an adult refuses to be assessed.

One option is to prohibit a statutory guardianship where a meeting cannot be arranged. If the adult faces serious risk of harm, the support and assistance provisions of Part 3 of the *Adult Guardianship Act* may be triggered, perhaps at a later point in time when the adult's situation has become more acute. This would maximize deference to the wishes of the adult but at some risk of delay, expense and most significantly jeopardy to the adult's best interests.

An alternative is to permit an assessment to be conducted without personally meeting with the adult but only in circumstances where a meeting cannot be arranged and there is compelling collateral information available. As this situation is less than optimal, a statutory guardianship obtained in this way should be time-limited. Its purpose is to permit necessary short-term intervention until a complete assessment can be conducted.

> *Recommendation: Statutory guardianship assessment on collateral information be permitted only in limited circumstances. Resulting guardianship be limited to 90 days and the authority of the guardian be limited to preservative powers rather than full guardianship powers. Renewals be permitted only where a complete assessment has not been feasible during the 90 days.*

(e) Considering Alternatives to Statutory Guardianship

If it is decided that the courts will be asked to consider less interventionist alternatives to a court appointed guardianship, the same should be expected in the case of statutory guardianship.

In at least one other jurisdiction the law provides that a statutory guardianship should not be issued where an assessor is aware of the existence of an Enduring Power of Attorney. This model was not adopted in the 2002 McClean Report presumably as being too

inflexible and potentially exposing the adult to risk in the event of misuse of the authority in the Enduring Power of Attorney. Nevertheless, there may be circumstances (including but not limited to the existence of an Enduring Power of Attorney) where the issuance of statutory guardianship is not appropriate. Rather than specify this one circumstance it is perhaps better to provide a general opportunity for alternatives to be considered before a certificate is issued.

One method of ensuring alternatives are considered is to require that where an assessor has assessed an individual as not capable and in need of a property guardian, the assessor shall give notice to the Public Guardian and Trustee. The Public Guardian and Trustee would then consider whether there are less restrictive alternatives to the issuance of statutory guardianship. Where no such alternatives are appropriate, the Public Guardian and Trustee would advise the assessor that there is no objection to the issuance of the Certificate of Statutory Guardianship. As a practical matter, some of this communication occurs under the current assessment guidelines but there is no requirement that it occur and the accountabilities are not clear. Through a structured process the incidence of inappropriate certificates would be minimized, together with their associated expenses.

Recommendation: If an assessor finds that an adult is incapable and requires a guardian, notice be given to the Public Guardian and Trustee of the finding. The Public Guardian and Trustee would be required to promptly determine whether there are less restrictive alternatives to the issuance of a Certificate of Incapability and promptly advise the assessor of whether they have an objection to the issuance of a Certificate of Incapability. Where the Public Guardian and Trustee advises that they do not object to the issuance of a certificate, the certificate may be issued by the official designated by the health authority.

(f) Establishing Right of Review of Certificate Issuance

The consequences of issuing a Certificate of Incapability are significant – a major one being the loss of civil rights to manage one's own property. British Columbia's law, perhaps uniquely in Canada, provides no straight forward means of appeal in the event an adult disagrees with a finding of incapability resulting in statutory guardianship. Furthermore, it is the only statutory guardianship law in Canada in which such a decision can be made and an individual subjected to a scheme of protection, no matter how well meaning, without recourse to an administrative tribunal.

Where the courts have appointed the committee it is clear that it is for the court to terminate the committeeship. It is less clear in the case of statutory committeeship. While the *Patients Property Act* appears to give the courts authority to terminate a statutory committeeship on the basis of the adult's capability (s. 11(1)(e)), this is not clearly stated. In the absence of administrative tribunal, a clearer right of appeal to the courts for statutory guardianship is necessary.

However, appeal to the courts should be a last resort. Some other form of intermediate administrative review is desirable. One possibility is to provide for an appeal to a tribunal. However, given the government's intention to abolish the Health Care and Care Facility Review Board it does not appear that an administrative tribunal remedy is likely. Another suggestion is to permit an adult who on first being assessed as incapable, disagrees with that assessment, to request a second assessment. Where the finding of the second assessment is consistent with the first, the statutory guardianship would remain. If the second assessment finds that the adult is capable the statutory guardianship would be terminated. A further assessment could not be required by the adult until at least six months have elapsed from the date of the second assessment (see recommendation below regarding periodic reassessment).

> *Recommendation: An adult who has a statutory guardian have an express right to a second assessment upon request (following their first assessment of incapability) and a right of appeal to the courts on the issue of capability.*

(g) Ensuring the Adult Receives Notice of Right to Appeal

Rights of appeal are irrelevant if the individual having that right is unaware of its existence. However, formal structures of independent third party rights advice can incur significant cost. A reasonable balance can be struck by requiring the Public Guardian and Trustee, in the event a Certificate of Incapability is issued, to advise the adult of his or her rights of appeal. This should be done in a manner appropriate to the circumstances of the individual adult.

> *Recommendation: Require the Public Guardian and Trustee to advise an adult of their right to seek a review of an issuance of a Certificate of Incapability upon the Public Guardian and Trustee becoming statutory guardian.*

(h) Reflecting the Community Based Nature of Care and Services

The origins of statutory guardianship relate to a time when individuals who were not capable of managing their property were often institutionalized. That has largely changed and the vast majority of individuals in respect of whom statutory committeeships are now issued are receiving supports in the community. Certain aspects of statutory guardianship reflect this institutional history, specifically:

- the limitation that certificates can only be issued by directors of mental health facilities or officers in charge of a psychiatric units; and

- the expedited termination provisions (in section 11) apply only in the event of "discharge" from a provincial mental health facility or psychiatric unit.

The institutional basis for issuing certificates is out of step with the delivery of community based care for seniors, the developmentally disabled and the mentally ill. Furthermore, the concept of "discharge" has proved to be problematic particularly in the context of individuals who continue to receive care but do so on an episodic or periodic basis and, when they do receive that care, do so on a non-residential basis.

> *Recommendation*: *The same structure should apply to statutory guardianship whether it is issued in respect of an individual who is an in-patient, out-patient or receiving no on-going adult community living services, mental health care or continuing care. No ongoing reference to the Mental Health Act should be retained. In addition, health authorities should be given flexibility to designate which persons are authorized to issue certificates of incapability.*

(i) Permitting Private Statutory Property Guardianship

Under the *Patients Property Act*, only the Public Guardian and Trustee may be appointed statutory Committee of Estate. This means that if an adult did not plan for their future incapability the only avenue open to family members is to apply to the Supreme Court of British Columbia to be named committee of estate. For many families this is not possible. Court applications are costly, time consuming and the process is unfamiliar and intimidating to many. The consequence is that there are some individuals, under statutory committeeship by the Public Guardian and Trustee, who have family members who would be suitable private committees but for a variety of reasons have declined to apply to court for authority.

One solution is to permit private individuals to apply to the Public Guardian and Trustee to replace the Public Guardian and Trustee as statutory guardian. The advantages would be to ensure that, wherever possible, a supportive individual who has a close relationship with the adult is their guardian rather than such adults remaining under the guardianship of the Public Guardian and Trustee. It is also important that such replacement not be automatic but rather should occur only where it is appropriate. After all, the court itself retains the discretion to reject or place conditions on an applicant for committeeship on the basis of suitability and it is important that a similar ability be retained in situations of statutory guardianship. An individual should be entitled to apply to replace the Public Guardian and Trustee if they are a spouse, near relative, a nominee of such an individual or a corporate trustee.

The applicant should be required to file a plan similar to that required for court applications describing the intended management of the adult's financial affairs and the Public Guardian and Trustee may require that security be posted in the same manner that would be required by court. A fee would attach to such an application to pay for the costs of considering the application but it is likely that it would be less than the cost of applying to a court.

Recommendation: Private individuals be entitled to apply to replace the Public Guardian and Trustee as statutory guardian. These applications shall be directed to the Public Guardian and Trustee who may, if appropriate, transfer the statutory guardianship to the private individual. If such transfer is not accepted by the Public Guardian and Trustee, the applicant may still apply to the court for a court appointed guardianship.

(j) Facilitating Termination of Statutory Guardianship

(i) Periodic Reassessment on Request

In the event that an adult regains capacity, statutory guardianship should terminate. Under the *Patients Property Act* there is no clear obligation or mechanism to ensure that this occurs. An individual under statutory guardianship should be entitled to request that their capability to manage their property be reassessed. Obviously some limits are required so as to eliminate repetitive, unnecessary reassessments being requested by individuals who simply disagree with the finding made by an assessor (or a court on appeal) that they are incapable. An appropriate balance could be that a reassessment be conducted, upon request, if the prior reassessment was made more than six months previously (except on the first assessment of capability where an immediate right to request a second assessment is recommended). As a practical matter, it is already the policy of the Public Guardian and Trustee to facilitate such reassessments but given the recommendations regarding transfer of statutory guardianship to private individuals it is necessary that this obligation on a statutory guardian be formalized.

Recommendation: A statutory guardian of property shall assist in arranging reassessment of an individual under statutory guardianship if so requested by the adult and if the immediately prior assessment was performed more than six months previously.

(ii) Require Reassessment on Release or Discharge

The *Patients Property Act* contemplates that statutory guardianships will be terminated if the adult regains capacity and is released or discharged. This can be accomplished either by a court or through a certificate of capability issued by the same administrative officials that issue certificates of incapability (s.11 (1)(d)).

It is important that the termination of statutory guardianship be as accessible as its creation. There is no current requirement that an adult in respect of whom a Certificate of Incapability was issued upon admission be reassessed upon release from a mental health facility. This is somewhat complex in that modern mental health treatment typically extends into the community and therefore determining

the event upon which such review is to occur is less clear than in the past. Historic concepts of "discharge" which were developed during the institutional care era have less applicability in the modern community based reality. Requiring a reassessment upon release from institutional care is a reasonable step which may serve to shorten the duration of statutory guardianship for some individuals who may be capable but for whom independently arranging an assessment of capability may be difficult.

It is somewhat more complex to determine the triggering event for a mandatory reassessment of capability for individuals receiving care and treatment in the community. Events such as completion or termination of a treatment in the community on extended leave under the *Mental Health Act* would appear important.

> *Recommendation: Adults under statutory guardianship be entitled to have their capability reassessed upon the occurrence of any of the following:*
>
> - *release from institutional or residential care (regardless of whether they are being fully discharged)*
> - *discharge from residential care, or*
> - *completion of extended leave under the Mental Health Act.*

(iii) Broaden Administrative Termination by the Public Guardian and Trustee

The *Patients Property Act* currently permits the Public Guardian and Trustee to terminate a statutory committeeship in respect of an adult who has not been declared capable where the adult has been discharged from the mental health system and the Public Guardian and Trustee is of the opinion that it is not necessary or desirable to continue the statutory guardianship (*Patients Property Act*, s.11(2)).

Such administrative discretion to terminate statutory guardianship, even in respect of an adult who has not been declared capable, is important. There are individuals who do not need a statutory guardian but for whom a reassessment would be difficult, traumatic or not likely to yield a finding of capability. Such individuals may have other supports that are more appropriate or they may have so few assets as to render the involvement of the statutory guardian an overly formal response. Furthermore, adults under statutory guardianship sometimes leave British Columbia and are receiving guardianship or other support elsewhere and the existing termination provisions do not effectively contemplate a simple solution to such factual circumstances. A straightforward termination by the Public Guardian and Trustee would appear justified.

Where a private individual has replaced the Public Guardian and Trustee as statutory guardian it is the Public Guardian and Trustee that should retain the ability to terminate the statutory guardianship. In this manner public accountability for the decision to terminate the guardianship can be retained.

Recommendation: The Public Guardian and Trustee be permitted to terminate a statutory guardianship on broad criteria including where there are other informal supports available in respect of the adult.

B. Clarifying that the Act Does Not Apply to Children

The *Patients Property Act* is not expressly limited in its application to adult British Columbians. In the past, on rare occasions, court orders and statutory certificates of incapability have been issued in respect of children. This raises issues of consistency with British Columbia's other laws applying to property owned by children. The scheme for substitutes together with the presumption of capability in modern adult guardianship statutes would appear to be inconsistent with the presumptions set out in the historic laws related to children's property. In any event, this matter was clarified recently when the British Columbia Court of Appeal allowed an appeal by the Public Guardian and Trustee and overturned a trial decision issuing a committeeship in respect of a child (*Macdonald v. British Columbia (Public Guardian and Trustee)* 2003 BCCA 428). This decision clarified that the *Patients Property Act* is only intended to relate to adults.

The *Adult Guardianship Act (Part 2)*, along with most modern adult guardianship statutes, is expressly limited to applying to adults and this would appear to be the preferred view. The 1993 legislation contains a helpful provision permitting guardianship applications to be made in the year prior to a child becoming an adult but delaying the coming into effect of the order until the child turns 19. This would permit planning, where appropriate, to avoid a period of time when an order may be appropriate but not yet obtained.

Recommendation: The Act apply only to adults. Permit court guardianship applications to be heard in the 90 days prior to a child turning 19 with such orders to take effect only on the child reaching the age of 19.

C. Modernizing Powers and Duties of Property Guardians

Most duties and many powers of property guardians were historically unstated in statute. There was some common law articulation of these but cases are relatively rare and the common law is not particularly well developed or understood. While some guardians are professional and thus, through years of experience, may have a developed sense of roles and responsibilities (e.g. trust companies, Public Guardian and Trustee) many other guardians are not. Many are simply well intentioned family members who out of love and affection for the adult, take on a task for which they may or may not be prepared. A clear statutory statement of fundamental expectations provides a basic standard for guardian conduct.

It is important at this stage of British Columbia's guardianship law development not to overprescribe guardianship duties. Adopting broadly accepted standards already in use in other jurisdictions is preferable to attempting to bind guardians to new and untested structures. Some innovation is possible but it should be reasonable and practical. The following are suggested as appropriate duties and standards for guardians.

1. Clarifying That Guardians are Fiduciaries

The *Patients Property Act* describes some duties of a committee (namely to keep certain records and submit them to the Public Guardian and Trustee when required [section 10]) and to invest the assets of the adult prudently [section 15(2)]. However, the *Act* is generally silent on the nature of the relationship between the adult under committeeship and the committee. The courts have generally described the role as one of an agent although a committee is subject to the rules governing trustees when choosing investments.

The *Adult Guardianship Act (Part 2)* contains a statement that a guardian is a fiduciary, requires the diligence, care and skill of a reasonably prudent person and is under a duty to act honestly and in good faith. The *Act* also enumerates other more innovative duties about which there may be some disagreement but the aforementioned fiduciary obligations are likely uncontroversial.

> *Recommendation: That guardians of property expressly be subject to fiduciary duties and guardians of the person be subject to duties of diligence and good faith.*

2. Clarifying Consultation Duties

The *Patients Property Act* is silent on the obligation on the committee to consult with the adult, their supportive family or friends when making decisions.

The *Adult Guardianship Act (Part 2)* requires consultation with the adult to the "greatest extent possible" when making decisions. A similar formulation in the *Representation Agreement Act* in force from February 2000 until amended in September 2001 was severely criticized by the legal community as being a virtually limitless obligation. In 2001 the provision was tempered to require that the representative "consult, to the extent reasonable" with the adult.

The involvement of the adult should be fostered. Guardians should encourage such participation to the best ability of the adult.

The question of the involvement of family and friends is more difficult. Family and friends can be of great support and assistance to the adult. Furthermore, through consultation with these individuals the guardian can learn more about the best interests of the adult. Guardians need to strike a difficult balance in keeping the adults financial information private while also involving the adults supportive family and friends where reasonable and appropriate.

Some guardianship laws also require guardians to further the involvement between the adult and their family and friends. This obligation while perhaps laudable is difficult to define and is better left for another time. However, it is not unreasonable to require the guardian to consult from time to time with supportive family and friends of the adult who are in regular personal contact with the adult and with their care givers.

> *Recommendations: Guardians be required to consult with the adult, supportive family and friends and the adult's caregivers from time to time so as to be reasonably well informed of the needs and current circumstances of the adult.*

3. Setting out the Considerations for Making Decisions Regarding Property Matters

The *Patients Property Act* is largely silent on how decisions are to be made except that a committee is required to act "for the benefit of the patient and patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family". This generally obligates a committee to act in the best interests of the adult and perhaps their family when making property decisions. The relatively general provisions of the *Patients Property Act* stand in contrast to the *Adult Guardianship Act (Part 2)*. That *Act* provides that decisions made regarding the adult's property be made in accordance with the following sequential steps:

- the incapable adult's current wishes if it is practicable to do so ('practicable" means "that can be done, feasible" [Concise Oxford], or "capable of being put into practice" [Webster])
- the instructions or wishes made by the adult when capable and applicable to the decision
- the adult's known beliefs and values
- and if none of above three apply, then the adult's best interests.

A similar formulation was in existence from February 2000 through September 2001 in the *Representation Agreement Act*. The obligation to comply with current wishes if "practicable" was changed in 2001 so that the *Act* now provides that such wishes are binding only if "reasonable".

The applicability of the multiple steps before decisions are made in accordance with "best interests" seems to be both unnecessary and inconsistent with general fiduciary obligations. Moving from a step-by-step sequential approach to one that includes the factors together is more applicable to property decisions. Applying the general best interest test twinned with an obligation to consult (see above) should provide a reasonable measure of individualization yet do so in a way that is not unduly inefficient, expensive or liability laden.

> *Recommendation: Decisions by a property guardian be made in accordance with best interests taking into account the adult's known prior capable wishes, current wishes and their values and beliefs along with other factors.*

4. Clarifying the Ability of the Guardian to Obtain the Adult's Property from Third Parties

Fundamental to the role of acting as a guardian of property, indeed to any person managing property under fiduciary obligations, is the protection and control of the property under administration. Interestingly, both the *Patients Property Act* and the *Adult Guardianship Act (Part 2)* are silent on the power of a guardian to take control of the adult's property where that property is in the possession of third parties. This omission can easily be remedied by a clear provision requiring property to be delivered by third parties to the guardian if requested.

> *Recommendation: Clear provisions regarding the guardian's ability to obtain the property of the adult under guardianship be included.*

5. Clarifying Record Keeping for Property Guardians

The *Patients Property Act* and the *Adult Guardianship Act (Part 2)* both require that a guardian maintain accounts. This obligation is rather general in the *Patients Property Act*. The *Adult Guardianship Act (Part 2)* provides that the accounts shall be in a form prescribed by regulation. Because the *Act* was not proclaimed, the regulation was also not promulgated. However, some precedent can be found in the *Representation Agreement Regulation* (BC Reg 199/2001). Section 3 of that regulation provides a basic set of records for representatives to maintain. It would appear that these would be equally applicable to guardians. In a public sector environment of de-regulation there may be a suggestion that such matters are best left to "best practice". However, failure to establish a legal standard would mean that account review and passing, investigations and intervention costs, when required, will be higher in situations where guardians have failed to keep and maintain minimally acceptable records.

The *Adult Guardianship Act (Part 2)* requires a guardian to create an annual report to be filed with the Public Guardian and Trustee as well as with any monitor appointed. This additional record-keeping obligation, although perhaps theoretically advisable in creating a summary of an adult's financial affairs, is perhaps too onerous unless specifically authorized by the court. It is not recommended at this time.

When the regulation is being developed, consideration should be given to the current work of the Supreme Court Rules Committee as they consider establishing forms of account for trustees.

> *Recommendation: Guardians be required to keep records established by regulation and provide a copy, upon request, to the adult, the Public Guardian and Trustee and anyone specified in the order appointing the guardian.*

6. Clarifying Specific Property Management Issues

(a) Gifts

Three types of gifting issues arise most typically in respect of adults under guardianship. These involve gifts to charities, gifts to paid caregivers and gifts to family members. Different considerations arise in respect of each of these.

(i) Charitable Gifts

The *Patients Property Act* is silent on the ability of a committee to make charitable gifts of the adult's property. The *Adult Guardianship Act (Part 2)* is similarly silent. The *Representation Agreement Regulation* (s.2(1)(v)) permits charitable donations by a representative as routine financial management subject to three limitations: 1) consistent with the adult's financial means; 2) consistent with adult's past practice; and 3) subject to a maximum of 3% of income.

> *Recommendation: Gifts to registered charities be permitted (but not required) only when the adult had a pre-incapacity practice of making gifts to the charity, the adult can afford to continue making such gifts and the total of all charitable gifts is subject to a specified percentage of the adult's income in a year. Such gifts can be prohibited by a specific order of the court.*

(ii) Gifts to Paid Caregivers

Some individuals under guardianship receive care from paid caregivers who are not family members.

Where the adult is living in a facility governed by the *Community Care Facility Act* there is a statutory prohibition on licensees or employees of community care facilities persuading or inducing a resident to make a gift. Under that *Act* such gifts are void (unless consented to by the Public Guardian and Trustee.)That *Act* does not expressly deal with the question of whether employees may accept gifts from guardians, rather the prohibition is on gifts made by residents. Regardless, the policy intent is clear and is a good one. However, it only applies to residents of facilities covered by that *Act*. The *Community Care and Assisted Living Act* (not yet proclaimed) carries forward a version of the prohibition for community care facilities (although it appears to exclude employees from the ambit of the prohibition and applies only to licensees). Assisted living residences are not covered.

Given the wide variety of living circumstances of adults under guardianship, it would appear to be preferable to focus on the conduct of the guardian rather than the precise type of residential facility in which the adult resides. A general prohibition on guardians making gifts of the adult's property to paid caregivers (other than the adult's family) would appear to be appropriate.

> *Recommendation: Guardians be prohibited from making gifts of the adult's property to paid caregivers who are not family members of the adult, subject to a contrary order of the court.*

(iii) Gifts to Friends or Family Members

There are two types of transfers of property from adults under guardianship to non-dependent family members or friends that can be characterized as "gifts". The organization of an adult's assets for estate planning purposes is one – it will be dealt with in the section below. The other, more ordinary or routine type of gifts involve birthday or holiday presents by an adult.

The *Patients Property Act* and the *Adult Guardianship Act (Part 2)* are silent with respect to the authority of a guardian to make such ordinary holiday or birthday gifts. The *Representation Agreement Regulation* appears to prohibit such gifts since expressly permitted gifts are limited to those to registered charities (*Representation Agreement Regulation* s.2(2)(e)).

The traditional restriction on gifts is to prevent financial abuse and in recognition that gifting is an act of personal commitment, not simply property transfer. On the other hand, permitting gifts to be made by guardians can maintain a link with the adult, for example for young children with elderly grandparents under guardianship. Gifts to family members should be limited to circumstances where there is a pre-existing practice of making such gifts. Furthermore, gifts should only be made if the adult can afford to make such gifts and if an adult expresses a current wish that a gift not be made, the guardian should not make the gift.

> *Recommendation: Guardians be permitted to make routine gifts to family members only where there is (and only to the same extent as) a pre-existing practice and where the adult can afford that such practice continue. Where an adult expresses a current wish that the gift not be made, the guardian is not to make a gift notwithstanding the existence of a pre-existing practice.*

(b) Supporting Legal Dependents

Adults under guardianship may, like anybody else in society, be under a legal obligation to support a dependent family member. The fact of being under guardianship does not, nor should it, affect this legal obligation.

> *Recommendation: Guardians be required to provide for the adult's dependents from the adult's property in the same priority and to the same extent as if the adult did not have a guardian.*

(c) Transferring Property During the Adult's Lifetime for Estate Planning Purposes

As the population ages, there will be continued interest in the ability to engage in estate planning. For adults who fail to plan while capable, there has been some interest in estate planning by committees under the *Patients Property Act*. This issue was addressed by the Court of Appeal in the recent decisions of *Re: Bradley 2000 BCCA 78* and *O'Hagan v. O'Hagan 2000 BCCA 79*. The court held that the question to consider is "whether a reasonable and prudent business person would think that the proposal in question would be of benefit to the patient and his family, in light of the circumstances known at the time and that might arise in the future, and giving paramount importance to the patient's own interest, present and future."

The courts have permitted certain corporate reorganizations for adults whose wealth is primarily contained in closely held corporations where the transaction did not compromise the net worth of the adult nor transfer assets to family members prior to the death of the adult. Furthermore the court has indicated that court approval should be sought if any estate reorganization in which the committee is in a position of conflict due to the receipt of a direct or indirect benefit.

> *Recommendation: The existing common law regarding estate planning by guardians be preserved at this time.*

(d) Making, Amending or Revoking Testamentary-Type Documents

The *Patients Property Act* indicates that a committee may do things that an adult could do in respect of their property if of "sound and disposing" mind. Despite the broad language it is accepted that this does not include the right to make or alter the adult's will. Testamentary capacity is a separate matter and some adults who have a guardian have capacity to make a will.

Somewhat more complex is the appropriateness of the guardian making or altering testamentary type documents (i.e. beneficiary designations). Certain decisions or transactions that are appropriately made by a guardian could require that a new such

designation be made. In the absence of court approval to the contrary such designations should, in the case of renewals or rollover-type transactions (such as establishing an RRIF with the proceeds from an RRSP) be consistent with the original designation. Entirely new designations should be to the estate of the adult.

Altering existing designations should be prohibited except in the event of matrimonial breakdown (resulting from a "triggering event" under the *Family Relations Act*, s.56).

> *Recommendation: Guardians be prohibited from making, changing or revoking the adults will. Guardians be permitted to renew or rollover existing beneficiary designations on the same terms as were made by the adult. Varying beneficiary designations only on matrimonial breakdown. Where a new beneficiary designation is required it shall be in favour of the adult's own estate except with court approval.*

(e) Avoiding Ademption

Ademption occurs when a person leaves specific property in a will to a named person, but no longer has that property at the time of death. The consequence of an ademption is that the gift fails. While this consequence is harsh the legal principle is that testators are responsible to manage their own affairs and keep their wills current.

Different considerations arise when a person can no longer make a new will and a guardian is responsible for their financial affairs and property. In such circumstances the guardian of property should be required, where reasonable, to manage the adult's property in such a way that an ademption will not occur. In order to do this, it is important that the guardian take reasonable steps to determine whether the adult has made a will, and if so, the provisions of the will. Obviously this must be balanced with setting limits on the obligation of a guardian where the guardian is aware of multiple conflicting wills (some of which may not be valid since the validity of any particular will is a matter that will not be determined until after the death of the adult).

Having determined that specific bequests exist in a will the guardian should be generally under an obligation not to dispose of that property unless it is necessary in order to comply with other duties including meeting the needs of the adult (or where otherwise authorized by a court). Obviously, the adult's current needs take precedence but, in general, if the property subject to the specific bequest can be preserved this is preferable.

Finally, although not directly a matter for guardianship law, a collateral amendment to estate law that provides that ademption does not apply to property subject to a specific testamentary gift that has been disposed of by a guardian would appear appropriate. This could include leaving the person who, but for the ademption, would have received the gift a corresponding and equivalent right in the proceeds of the property (without interest). The gift could be on a pro rated basis if the residue is insufficient. This statutory scheme could be subject to a contrary intention expressed in the will.

Recommendation: Guardians of property be under a duty to make reasonable efforts to obtain an adult's will and individuals in possession of a will be required to give a copy to the guardian (except where an adult gave express instruction, when capable, to their lawyer to the contrary). Where a will is obtained, the guardian be required to manage the adult's property in a manner that does not dispose of specific testamentary gifts except to meet other duties of a guardian such as meeting the adult's needs or paying debts. Consideration be given to collateral amendments to estate law to provide that the doctrine of ademption does not apply to dispositions by guardians, and providing for a substitution gift, subject to a contrary intention in the will.

(f) Managing Property in Accordance with Personal Decisions

The *Patients Property Act* provides for the appointment of a committee for one, or both, of property and personal care matters. The *Act* is silent on how issues between property and personal care committees are to be resolved in the event that more than one committee is appointed in respect of each area.

The *Adult Guardianship Act (Part 2)* does not distinguish between guardians of property and those of personal care. Rather, the *Act* provides for a number of heads of authority and permits the court to appoint a guardian in respect of specific matters. Where multiple guardians are appointed the court is required to specify a method of resolving disputes between the guardians.

Requiring court-designed dispute resolution mechanisms in every case of multiple guardians is too complex. Typically, property and personal guardians are able to cooperate. Such cooperation would be facilitated by general indications of how decisions are to be made where they affect both property and personal care aspects of the adult's life. The primary rule that should apply to any property guardian is that if a decision would have an impact on the adult's personal comfort or well-being, that impact needs to be considered when determining whether the decision is for the benefit of the adult. Furthermore a property guardian should manage the adult's property in the manner consistent with the adult's personal care. In other words, the property guardian should, whenever possible, cooperate and support the personal care decisions related to the adult's personal living circumstances (whether those are made by the adult, representative or personal guardian).

There must be some limit to this obligation imposed on the property guardian given that the adult may simply be unable to afford the short or long term consequences of desired personal care decisions. It is a difficult matter to weigh the negative impact on the adult's financial situation against what might be the positive effect on the adult's personal care. Nevertheless, it is a decision that property guardians must squarely face and do so to the best of their ability. It is similar to decisions faced by many capable adults every day in making their own budgeting decisions. The law should strike the best balance it

can by providing that the property guardian manage the adult's property in a manner consistent with the personal care decisions unless the adverse consequences in respect to the property significantly outweigh the benefits in respect of the person's personal care. Finally, the property guardian should not be required to support an activity of the adult that poses a risk to the health or safety of the adult or other persons.

Recommendation: When determining whether a decision is for the benefit of the adult, a guardian of property should consider whether the decision would impact the adult's personal comfort or well being. A guardian of property should manage the adult's property in a manner consistent with the adult's personal care unless the benefits of the personal decisions are outweighed by the adverse consequences in respect of the property, or pose an undue risk to the health and safety of the adult or others.

D. Clarifying Role, Powers and Duties of Personal Guardians

1. Clarifying Scope of Authority

The *Patients Property Act* is virtually silent on the role, powers and duties of committees of the person. Indeed, even the *Act's* title reinforces the notion that personal care matters are at best an adjunct to the *Act's* primary focus which is related to property matters. The only substantive reference to personal care matters is found in the declaration that the committee has "the custody of the person of the patient" (Section 15(1) (b)).

The *Adult Guardianship Act (Part 2)* contains a number of what are described as "examples" of a guardian's powers but the court must specify those areas where the guardian has decision-making authority (Section 18(a)).

Earlier in this paper, four areas of personal care were specified together with a recommendation that the guardian be appointed for one or more of those areas only if the court is satisfied that the adult is incapable in respect of that particular area of personal care. If an adult is not capable of making personal care decisions in all of these areas then a full guardian of person would be appointed if necessary.

Generally, the guardian should be able to make the same range of personal care decisions that the adult could make if capable. However, there are specific common law exceptions to this broad authority. These exceptions provide that a guardian not be permitted to make decisions in respect of non-therapeutic sterilization, research not specifically of benefit to the adult or transplant of tissue out of the adult's body.

Recommendation: That the scope of authority of a guardian having full decisional rights regarding personal care in respect of an adult include the ability to make decisions in respect of the four identified aspects of personal care to the same extent as if the adult were capable (except that the guardian not have authority to consent to non-therapeutic

sterilization, non-beneficial research or transplant of non-regenerative tissue from the adult's body). In the longer term, the issue of the law pertaining to research involving adults unable to give or refuse consent be the subject of a separate review.

2. Setting Out the Considerations for Making Decisions Regarding Personal Matters

The *Patients Property Act* is silent on how decisions are made with respect to personal care decisions. The *Adult Guardianship Act (Part 2)* provides the same formulation as for property decisions, specifically that decisions be made in accordance with a four part sequential test. While it was recommended above that in respect of property decisions, best interests be the primary criteria for decision-making, the difficulties in the *Adult Guardianship Act* are less acute when applied to personal care decisions. Prior capable issues, current wishes and values all do play a somewhat more predominant role in personal care decisions than in property management.

The *Adult Guardianship Act* scheme of making decisions could be somewhat streamlined. Specifically, priority could be given to instructions or wishes that the adult had when capable that are applicable to the decision being made by the guardian. Earlier, this discussion paper recommended that such wishes, with respect to property, be not determinative but form part of the best interests decision. With respect to personal care, however, where there are more intimate issues involving bodily integrity, religious faith and personal dignity, instructions or wishes expressed when capable that are applicable to the decision should be determinative.

Values and beliefs and the current wishes of the adult are also two very important factors that should be taken into account in the event that there are no applicable prior capable wishes. Combined with an obligation to consult with the adult (see above) current wishes and values and beliefs can be given an express role within the definition of best interests. To elevate them to a status higher than best interests and thus exclude the more multi-factored questions that arise in the context of best interests would not necessarily lead to good outcomes for adults under guardianship. Experience to date with the test under the *Health Care (Consent) and Care Facility (Admission) Act* suggests that allowing single factors to determine what may be a complex decision requiring the balancing of many different elements is to oversimplify the task of making substitute decisions.

> *Recommendation: Decisions by personal guardians be made in accordance with instructions or wishes made when the adult was capable and that are applicable to the decision. In the absence of such instructions or wishes, decisions be made in accordance with best interests, of which current wishes and values and beliefs are express components, along with other factors such as the risk and benefit of the decision in question.*

3. Involving the Adult and Supportive Family and Friends

Personal care decision-making is best informed through maintaining periodic personal contact with the adult as well as with those individuals supporting the adult. The purposes of the contact with the adult are so that the guardian:

- can encourage the adult to participate to the best of his or her abilities in the guardian's decisions,
- can support or attempt to foster the independence of the adult, and
- is better informed when making decisions.

Consultation by the guardian with family and friends who are in supportive regular personal contact with the adult and with caregivers is also important because these individuals can provide additional information about the adult's needs, wishes, values and best interests. Furthermore, involvement with the guardian may reinforce, for family and friends, the contribution that their support is providing to the adult.

> *Recommendation: Personal guardians encourage the adult to participate in the guardian's significant decisions to the best of the adult's abilities. Guardians seek to foster the adult's independence. Guardians consult from time to time with supportive involved family, friends and caregivers.*

4. Clarifying Record Keeping for Personal Guardians

The *Patients Property Act* requires that committees keep accounts for the purpose of passing the accounts (s.10). Such passing is applicable to property decisions but there is no requirement clearly applicable to personal care decisions.

The *Adult Guardianship Act (Part 2)*, requires that a guardian prepare an annual report and give it to the Public Guardian and Trustee and monitor. The report was to be in a prescribed form. No form was prescribed because the *Act* did not come into force. The *Representation Agreement Regulation* requires that records be kept by representatives regarding financial decision-making authority but not personal decisions.

Where the Public Guardian and Trustee appoints a private person to act as temporary substitute decision-maker under s.16(3) of the *Health Care (Consent) and Care Facility (Admission) Act* such person is required to keep records of decisions. However, family temporary substitute decision-makers listed under s.16(1) are not required to keep records of their substitute decisions.

Record keeping is desirable but an obligation to keep records must balance practicality with accountability. A relatively simple list of people consulted, related records, the major considerations involved in the decision, as well as the decision itself would appear sufficient.

Recommendation: Personal guardians be required to keep records of decisions to be made available upon request to the court, the Public Guardian and Trustee or any other person specified by the court.

E. Clarifying Information and Privacy Issues

The *Patients Property Act* is virtually silent with respect to information and privacy issues. The *Adult Guardianship Act (Part 2)* addresses some information issues but is also quite limited in this regard. The *Freedom of Information and Protection of Privacy Act* has substantially changed the information and privacy practices in institutions governed by that *Act*. Furthermore, the *Personal Privacy Protection Act* which came into effect on January 1, 2004, applies privacy provisions to much of the private sector including corporate trustees and many third parties providing information to guardians. This new law will undoubtedly result in an increased formalization and greater attention to questions of whether a particular personal information collection, use or disclosure is not only appropriate but authorized by law. For these reasons it is both timely and important that this area of the law be clarified.

It is important not only that guardians have clear authority to obtain the information necessary for them to carry out their responsibilities but also they do so in accordance with modern expectations regarding personal privacy. As a result, there are a number of specific issues that need to be addressed.

1. Authorizing Disclosure of Personal Information in the Course of an Assessment of Incapability

Incapability assessment reports contain personal medical and other information relating to an adult. Personal medical information is typically not shared without the consent of an adult, if capable. However, the circumstances surrounding an assessment are such that the very purpose of the assessment is to determine whether the adult is incapable and therefore requires a guardian. Although a difficult area requiring balancing of interests, it is important that assessors have authority to disclose personal information to potential guardians (or their lawyers) provided they have no reason to believe that the person requesting the assessment is not acting in good faith. A minimum standard would be that an assessor should be permitted (but not required) to disclose a report to a person requesting the assessment if the requester states, in writing, to the assessor that they are obtaining this information for the purpose of preparing a guardianship application.

In 1995, the College of Physicians and Surgeons published an article on this subject in their *College Quarterly* sent to all physicians. The College recognized the complexity of obtaining consent when making such disclosure. However, more formal support for physicians given the continued heightened awareness of personal privacy issues is desirable.

Recommendation: Permit a physician, or other person carrying out an assessment, to disclose personal information regarding an adult to the Public Guardian and Trustee or to a person or their solicitor who states in writing that they intend to make an application

to appoint a guardian for the adult who is the subject of the assessment. The person who obtains such information shall be prohibited from using or disclosing such information for any purpose other than for the purpose of a guardianship application or, if appointed, as a guardian, as otherwise permitted or required by law.

2. Authorizing Guardians to Obtain Documents

The *Patients Property Act* provides that the committee has the powers with regard to the estate of the patient as if the adult were of age and of sound and disposing mind. This is not a sufficiently clear basis on which to obtain information. The *Adult Guardianship Act (Part 2)* has a clear statement (Section 27) that gives guardians the right to information required to carry out their role and requires individuals who have that information to disclose it to the guardian. A parallel provision in the *Representation Agreement Act* was clarified in 2001 to ensure that the disclosure provisions were effective in giving the guardian the same rights of access as if the adult were capable.

Recommendation: That guardians have clear rights to the information that the adult would be entitled to, if capable, and that relate to the guardian's area of authority.

3. Authorizing Guardians to Act on Adult's Behalf Under Information and Privacy Laws

The *Freedom of Information and Protection of Privacy Regulation* provides that an adult's information and privacy rights under that act may be exercised, if they have a committee, by the committee. The regulation does not contemplate people who have planned for their future incapability by appointing attorneys acting under powers of attorney or representatives acting under representation agreements nor does it sufficiently provide for the fact that committees may have different areas of authority which may or may not be connected to the type of information involved.

By contrast the new *Personal Information Privacy Regulation* (BC Reg. 1467/2003/4) is an improvement. It recognizes the authority of committees, representatives, attorneys and litigation guardians.

Recommendation: The Freedom of Information and Protection of Privacy Regulation (BC Regulation 323/93) be clarified as it relates to guardians (and other substitute decision-makers). Such clarification be similar to that enacted in the Personal Information Privacy Regulation.

4. Requiring Guardians to Keep Information Confidential

Guardians already subject to privacy laws are required to exercise appropriate personal information management practices. The Public Guardian and Trustee is the only guardian subject to the *Freedom of Information and Protection of Privacy Act* it is not clear that all private guardians such as family members are or should be covered by that *Act*. While some guardians

are subject to the new *Personal Information Protection Act*. Guardians have access to a tremendous amount of personal information regarding the person under guardianship and it is important that they keep this information private except where disclosure is required to carry out their responsibilities or otherwise required by law.

The *Patients Property Act* is silent in this regard. The *Adult Guardianship Act (Part 2)* provides that information is to be kept confidential.

> *Recommendation: Guardians not already subject to the Freedom of Information and Protection of Privacy Act nor to the Personal Information Protection Act, be under a duty to keep information (obtained under the authority of acting as guardian), confidential except where disclosure is required for the purpose of carrying out their role as guardian or otherwise required by law.*

5. Authorizing Disclosure of Certain Information Regarding Guardianships

Patients Property Act court files are matters of public record. If someone is aware that an application has been made in respect of an adult they can review the court record. Frequently, a third party wants to determine whether or not a guardian has been appointed in respect of an adult, how to contact the guardian, the scope of authority of a guardian or whether the appointment remains in force. Reviewing court files is an inefficient way to find out this information.

Most basic information regarding court and statutory guardianships is already in the possession of the Public Guardian and Trustee. However, neither the *Patients Property Act* nor the *Adult Guardianship Act (Part 2)*, specify what information is a matter of public record. Permitting the Public Guardian and Trustee to disclose basic information upon request regarding a specific adult should be uncontroversial. As it relates to court guardianships, the information is already publicly available in the court and accessing this information through the Public Guardian and Trustee is simply a more practical alternative. With respect to statutory guardianships, given that it is the Public Guardian and Trustee itself that is the initial statutory guardian, disclosure of this fact is a necessary consequence of carrying out the role.

> *Recommendation: The Public Guardian and Trustee be permitted to disclose basic information identifying guardians and providing their contact information. Disclosure be limited to responding to a specific request by name of the adult and be subject to a residual discretion for the Public Guardian and Trustee to decline to release the information where it would not be in the best interests of the adult or the guardian to do so. In order to increase the accuracy of such information guardians be required to report any change to the basic information regarding the guardianship including contact information for the guardian.*

F. Recognizing Mobility

British Columbians are mobile. They may live in British Columbia, but may hold property in other jurisdictions, travel elsewhere in Canada and internationally and have family and friends located worldwide. Similarly there may be residents of other jurisdictions, in Canada or elsewhere, who travel to British Columbia or hold property here while remaining ordinarily resident in a jurisdiction outside British Columbia.

Traditional guardianship law approached guardianship on a jurisdiction-specific basis. This compartmentalized approach was to ensure that a guardian remained under the supervision of the court that had appointed them. While ensuring protection, such a rigid view tends to make management of an adult's affairs or decisions difficult if decisions are required in more than one jurisdiction. There is only limited ability for any one jurisdiction to make improvements. Harmonization or the development of a model uniform adult guardianship law by, for example, the Uniform Law Conference of Canada (the primary organization for fostering harmonization of laws of provincial or territorial jurisdiction) is needed to properly resolve the difficulties of moving between jurisdictions within Canada. Within British Columbia there is only the ability to provide for appropriate recognition of guardianships obtained elsewhere if decisions are required in British Columbia. British Columbia cannot require other jurisdictions to recognize the authority of a British Columbia appointed guardian.

1. Facilitating Recognition of Guardianships from Other Jurisdictions in Canada

(a) Recognizing Court Ordered Guardianships from Other Provinces or Territories in Canada

If a person resident in another province is under guardianship and has property in British Columbia the Lieutenant Governor in Council may appoint the guardian as a committee under the *Patients Property Act* (Section 31). This Lieutenant Governor in Council provision is an anachronism and is not widely known.

The *Adult Guardianship Act (Part 2)* carried forward this Lieutenant Governor in Council provision and additionally provided for resealing by the Supreme Court of British Columbia of orders made elsewhere in Canada or prescribed jurisdictions outside Canada.

The resealing provision would appear to be sufficient for the purpose of court order authority and would eliminate the involvement of the provincial Cabinet in this area.

> *Recommendation: Court guardianship orders from other provinces or territories in Canada or from other prescribed jurisdictions outside Canada be subject to a resealing by the court if required for the purposes of decisions in British Columbia. The effect of such resealing would be to deem the order to be a guardianship order in British Columbia.*

(b) Recognizing Statutory Guardianships of Property from Other Provinces or Territories in Canada

Resealing is inapplicable to extraprovincial statutory property guardianship authority since there is no court order in the originating jurisdiction. However, a method of recognizing statutory property guardianships through a prescribed list of recognized authorities from elsewhere in Canada would be sufficient. The vast majority of statutory guardians are public authorities themselves and thus the issue of posting security does not arise.

> *Recommendation: Statutory guardianships of property from elsewhere in Canada be recognized. The effect of recognition would be that the statutory guardianship of the other province would be recognized as a statutory guardianship of property in British Columbia and the statutory guardian in the originating jurisdiction would be a statutory guardian in British Columbia.*

2. Facilitating Recognition of Guardianships from Other Countries

Streamlined recognition of guardianship that originates elsewhere in Canada is possible because of the relatively consistent statutory basis on which such orders are made and because guardianship laws across Canada are subject to the same constitutional rights and protections embodied in the *Charter of Rights and Freedoms*. However, there may be other countries (or states within other countries) with laws and legal systems sufficiently similar to British Columbia's to merit recognition on a jurisdiction-specific basis. Permitting the Lieutenant Governor in Council to prescribe guardianships arising in non-Canadian jurisdictions to have access to the resealing provisions would allow flexibility where the schemes are substantially similar to British Columbia's.

The problem remains regarding jurisdictions with guardianship laws that are too different to make resealing appropriate. One approach would be for British Columbia to request that the federal government ratify the *1999 Hague Convention on the International Protection of Adults*. This convention, to which Canada is a signatory, provides for the jurisdiction, applicable law, mutual recognition and cooperation when an adult under guardianship has property or personal decisions to be taken in more than one jurisdiction. However, ratification is likely some time away given the low level of awareness surrounding the convention in British Columbia and elsewhere in Canada.

> *Recommendation: The Lieutenant Governor in Council be permitted to enact a regulation specifying foreign jurisdictions from which guardianships could be resealed in British Columbia. Further study on recognition of foreign guardianships be carried out in the longer term.*

3. Facilitating Termination of British Columbia Guardianships Where Adults Under Guardianship Move to Another Jurisdiction

Terminating guardianship when an adult has left the jurisdiction can be difficult and expensive. A recent court decision in *Johnston v. Johnston, 2003 BCSC 110,* has added to the complexity. The court found that in order to declare a person is no longer incapable under the *Patients Property Act* the court must be presented with the evidence of two medical practitioners that are licensed to practice medicine in British Columbia. In the case of an adult who has already left British Columbia, finding two British Columbia licensed medical practitioners where the adult now lives may be next to impossible.

Furthermore, where the adult is under statutory guardianship and the Public Guardian and Trustee is of the view that the services of a British Columbia guardian are no longer appropriate because the adult is able to receive support in another jurisdiction a straight forward administrative termination of authority is desirable (the need to facilitate such administrative termination was addressed earlier in this paper).

> *Recommendation: The permissible evidence to support termination of a court ordered guardianship should include the evidence of whoever is responsible for incapability assessments in the jurisdiction where the adult is now habitually resident. British Columbia statutory guardianships in respect of an adult who has left the jurisdiction should be able to be terminated administratively if the Public Guardian and Trustee believes that services of the statutory guardian are no longer required because the adult is able to receive support in another jurisdiction.*

G. Streamlining and Clarifying Fees

1. Clarifying Fees for Private Guardians

Compensation for performing the duties of a committee under the *Patients Property Act* is fixed on a passing of accounts. A private committee is allowed "reasonable compensation". The Public Guardian and Trustee's fees are established by the *Public Guardian and Trustee Fees Regulation* (BC Reg 312/2000).

Not surprisingly there has needed to be some definition of the concept of "reasonable compensation". The Public Guardian and Trustee has, using judicial precedents interpreting "reasonable compensation", developed guidelines for use when passing the accounts of private committees. The Public Guardian and Trustee generally allows the following fees:

- 5% of income received (income commission)
- 0.4% per year of the average market value of assets under administration (asset management fee)
- one time set-up fee of 1% capital and 4% on reserve for special fees subject to subsequent approval (capital commission).

The *Adult Guardianship Act (Part 2)* provides for prescribed guidelines to be established and states that the court may remunerate the guardian in accordance with those guidelines. The *Act* does not provide for remuneration other than in accordance with the guidelines.

This area requires reform. On the one hand, some corporate committees (e.g. trust companies) are of the view that the fees allowed by the Public Guardian and Trustee on the passing of accounts are insufficient compensation for the risk assumed and services performed by the trust company. On the other hand, the Public Guardian and Trustee is of the view that its ability to permit higher rates of compensation is limited by judicial precedent interpreting "reasonable compensation" in the *Patients Property Act*.

One solution would be to prescribe a rate of compensation that may be taken without first passing accounts but provide that the compensation may be decreased or increased when the accounts are passed either before the Public Guardian and Trustee or, in the case of an increased fee, the court. If a guardian were seeking a fee in excess of the prescribed amount a passing of accounts would be required.

> *Recommendation: The fees allowed to private guardians be prescribed by regulation (except where the court established a different fee on appointment of the guardian) subject to variation on a passing of accounts.*

2. Streamlining the Timing of Taking Fees by Private Guardians

Pre-taking of fees occurs when a fiduciary takes fees before accounts are passed. It is generally prohibited at common law but may be permitted by statute. The general concern with pre-taking is that if the level of compensation approved on a passing of accounts is less than the amount pre-taken the adult will be disadvantaged if the fiduciary does not have the money to repay the excess.

There has been considerable interest from some corporate trustees regarding the pre-taking of fees particularly given the amendment in 2001 to the accounting scheme in the *Patients Property Act*. Because some committees may not account for many years, corporate trustees in particular have expressed interest in being able to take annual compensation subject to adjustment at the time of an accounting (including the repayment of interest on any fee pre-taken that was subsequently disallowed). Limiting pre-taking of fees to corporate trustees would be the most risk averse model. However, there are many other private guardians who would not pose an undue risk if they were permitted to pre-take compensation. Given the other controls on private guardians (for example, pre-appointment scrutiny, appointment by judge or Public Guardian and Trustee, and security such as bonding) permitting them to take compensation in accordance with the prescribed fee schedule in advance of a passing of accounts is reasonable. If, in the circumstances of the particular case, pre-taking would not be appropriate, it could be prohibited by the court on appointment or thereafter.

> *Recommendation: Subject to a court order to the contrary, a guardian be permitted to pre-take compensation up to the prescribed rate subject to repayment (including interest)*

if all or a portion of such compensation is disallowed at a subsequent passing of accounts.

3. Clarifying the Issue of Fees for Personal Guardianship

The *Patients Property Act* is unclear on the question of whether a Committee of Person is entitled to compensation for making personal care decisions. As a matter of practice, requests for compensation in respect of personal care decisions do not frequently occur and generally it does not appear to be contemplated by the *Act*. The *Adult Guardianship Act (Part 2)* left the matter to the guidelines to be prescribed by regulation. The *Representation Agreement Act* bans compensation for acting as a guardian when making decisions regarding health care and would permit compensation for non-health care personal decisions only where the representation agreement specifically authorized it and the adult either consulted with a lawyer or the court has authorized remuneration be paid.

Permitting compensation for personal care guardianship would increase the need for supervision of personal care guardians by the court and by Public Guardian and Trustee, particularly those persons who are also guardian of property and thus in a position of potential conflict of interest.

Earlier in this paper, a recommendation was made to permit family members who were paid caregivers to be guardians of property and/or person. A prohibition on personal care guardianship fees would not prohibit a guardian from receiving such caregiving fees.

It may be that at some point in the future a consensus can develop regarding the appropriate scheme and level of compensation for acting as guardian in personal care matters. Until that happens the issue of allowing such compensation is best left for another day.

Recommendation: Personal care guardians not be entitled to compensation for acting as guardians. However, personal guardians be entitled to be reimbursed from the estate of the adult for expenses reasonably incurred in carrying out their role of personal guardian.

H. Streamlining Supervision of Private Guardians and Passings of Accounts

Currently, the most significant aspect of supervising private committees and the major control on the taking of fees by committees is through the requirement that accounts be passed by the Public Guardian and Trustee or the court. This is supplemented by the investigative powers in the *Public Guardian and Trustee Act*.

Many committees do not wish to take fees, acting as they do out of love and affection for their family member. For this reason, and to add flexibility so that monitoring resources can be targeted where they will have the most benefit, in 2001 and 2003 changes were made to the *Patients Property Act* permitting the Public Guardian and Trustee to set individualized schedules for passings and to eliminate committee passings by the Public Guardian and Trustee after the

death of the adult. With these recent changes the Public Guardian and Trustee can, based on risk criteria, determine the frequency of passing on individual guardianships. Implementation of these changes is proceeding on a phased-in basis.

It is too early to yet determine whether these recent changes will provide sufficient flexibility to enable the Public Guardian and Trustee to redirect resources currently focused on passing committee accounts (most of which pass without material change) to the more proactive protection of adults under private guardianship. Such protection could include more intensive reviews of prospective guardianship applications, orientation support for guardians, and increased capacity to review and investigate allegations of misconduct by private guardians.

> *Recommendation: Guardians be permitted to apply to pass their accounts at any time. The court, the Public Guardian and Trustee, the adult and anybody else with leave of the court, be able to require a guardian pass their accounts.*

I. Clarifying the Administration of Legal Matters

1. Specifying the Role of Personal and Property Guardians Regarding Legal Matters

Different jurisdictions treat legal matters differently in terms of whether such matters fall within the purview of a personal or property guardian. The *Patients Property Act* is silent on the matter. This has not proved to be particularly problematic but some clarification would be desirable. In short, legal matters that relate to the property of the adult (such as bringing or defending civil causes of action the consequence of which would be to receive or pay damages) should continue to be the purview of financial management rather than personal decision-making. The pursuit of other legal rights or types of relief are probably best addressed by guardians of the person.

> *Recommendation: Legal proceedings relating to the property of the adult, including civil actions with monetary consequences should be part of the role of property guardians and other proceedings should come within the responsibility of personal guardians.*

2. Settling Litigation or Causes of Action by Guardians

Currently the settlement or compromise of an action when an incapable adult has a litigation guardian requires the approval of the Supreme Court of British Columbia in order to be legally effective. The court ensures, through its review, that the settlement is in the interests of the adult. The scheme also applies to the compromise of causes of action where no action has been commenced (Rule 6(14) and Rule 6(15)). As a matter of practice if the court is aware that a legal action is ongoing at the time of appointment of the committee it sometimes will require that the specific claim not be settled without court approval and that notice of the settlement of that claim be served upon the Public Guardian and Trustee.

The *Adult Guardianship Act (Part 2)* would replace court approval with that of the Public Guardian and Trustee if the adult has a guardian. Presumably the court would retain supervisory

responsibility where the adult required a litigation guardian but did not have a committee. The *Adult Guardianship Act* did not apply a monetary threshold as exists with respect to the Public Guardian and Trustee's review of settlements of children's claims under the *Infants Act* (s.40).

Consistency between the approval structure in respect to children and incapable adults is desirable unless legitimate reasons exist for a different system. However, there is likely no immediate consensus on either how this is best resolved nor on the financial consequences that would result from changing the structure. Furthermore, adopting the *Adult Guardianship Act (Part 2)* model would result in different methods of approvals in respect of mentally incapable adults between those who have a guardian and those who do not. There does not appear to be any reason to adopt such an approach.

> *Recommendation: Existing court review of settlement of legal claims of persons under guardianship be retained. In the longer term this matter be the subject of a separate review.*

PART 4: CONCLUSION

Measured affordable reform of the type recommended in this discussion paper is desirable at this time. It will modernize an area of the law that needs to be updated. Furthermore, it will provide a solid stable foundation upon which other reforms in future years can be based as fiscal and policy considerations permit.

A. Financial Impact of Proposed Law Reform

The recommendations set out in this discussion paper are specifically designed to avoid major upward cost impact given the current environment of public sector fiscal expenditure constraint.

However, the avoidance of major upward cost impact is not the same as stating that there would be no cost impact either on public organizations (for example, the courts and the Public Guardian and Trustee) or on private individuals. The cost impact of the changes could be upwards or downwards depending on the specific amendment. Given the current fiscal environment, any reforms that are to be adopted must be costed and, where required, resources allocated.

B. Legislative Packaging

The intent of this paper has been to focus on the substantive areas of law reform for long term guardianship. In doing so, this paper attempts to bring a fresh approach to the issues at hand rather than being unduly restricted by either the *Patients Property Act* or the *Adult Guardianship Act (Part 2)*. In the event that some or all of the recommendations for law reform contained in this paper are accepted, a decision will need to be made about how best to implement the changes. Specifically, it will have to be decided whether to amend the *Patients Property Act*, the *Adult Guardianship Act*, or to enact an entirely new statute. While not unimportant, too much focus on this question can result in overly simplistic or historically based positions rather than on the substantive issues within the law. Practically speaking, if the vast majority of recommendations set out in this paper were rejected and only a few implemented, packaging the changes within the *Patients Property Act* would be feasible. On the other hand, if many of these recommendations are accepted, then it would be more feasible to enact a new guardianship law either within the *Adult Guardianship Act* or an entirely new stand alone statute. In short, the choice of legislative packaging should be driven by the extent of the reform.

The impact on other laws should not be ignored; the repeal of the *Patients Property Act* has been contemplated (through consequential amendment to other laws passed in 1993 that remain unproclaimed in the Supplement to the *Revised Statutes of British Columbia*) and so could probably be readily carried out together with a revised *Adult Guardianship Act (Part 2)*. The creation of a stand alone guardianship statute that is neither the *Patients Property Act* nor *Adult Guardianship Act (Part 2)* would mean that further consequential amendments would be required (and that the existing *Adult Guardianship Act* would have to be renamed to focus only

on the provisions of Part 3 of that act relating to support and assistance for adults who are abused and neglected).

More important though than the legislative logistics is the question of the legislative principles on which the various acts are founded. A coherent guardianship law founded on modern principles that seeks to strike an appropriate balance between protection and autonomy presents a solid foundation upon which to build in future years. To continue to amend the *Patients Property Act* will likely lead to a patchwork quilt which may provide some short term relief but will not stand the test of time.

C. Consultation

Reform of this area of the law has involved consultation with a range of stakeholders. This has been true from the late 1980's Project to Review Adult Guardianship through the recent 2002 "Review of Representation Agreements and Enduring Powers of Attorney" (McClean Report). The goal of such consultation is that, if successful, the widest range of input into an issue is received and considered before decisions are made. It is in this spirit and for this purpose that this discussion paper has been prepared. The purpose of this paper is to stimulate discussion on the matters proposed for reform. Therefore, broad circulation of this document and an opportunity for input – positive or negative – is encouraged.